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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 493

IRENE ETHEL VINYARD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

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INDEX.

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Reasons for granting the writ	6
Conclusion	10
Appendix A—Statutes	11
Appendix B—Opinion and judgment below	15
Appendix C—Conflicting opinion	34

CITATIONS.

Cases:

Massiah v. U. S., No. 199, 32 L. W. 4389	5, 9, 10
Sherman v. U. S., 78 S. Ct. 819	8
Sorrels v. U. S., 53 S. Ct. 210	9
Wisniewski v. U. S., 247 F. 2d 293	5, 6, 8
Wong Sun and James Wah Toy v. U. S., 83 S. Ct. 407	7

Statutes:

Title 18, U. S. C., Section 201 (b) (3)	3
Title 26, U. S. C., Section 2871, 1939	3, 6, 7
Title 26, U. S. C., Section 5301, 1959	3, 6, 7

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner, Irene Ethel Vinyard, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on August 12, 1964.

CITATION TO OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit, printed in Appendix B hereto, is as yet unreported.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered on August 12, 1964 affirming the judgment of the United States District Court for the Eastern District, Eastern Division of Missouri; the jurisdiction of this Court is invoked under 28 U. S. C., Supreme Court of the United States, Rule 19 (b).

QUESTIONS PRESENTED.

1. Whether or not the decision of the United States Court of Appeals for the Eighth Circuit in this case conflicts with a previous decision of the United States Court of Appeals for the Eighth Circuit with reference to the construction of a federal statute and criminal responsibility for the violation thereof.

2. Whether or not evidence obtained from a person while under unlawful arrest on one charge can be used in prosecution of the same person on another criminal charge.

3. Whether or not the theory of "color of law" as grounds for arrest of a person by a Federal Agent is a violation of the Constitutional rights of persons.

4. Whether or not the petitioner herein was the victim of entrapment as a matter of law by Federal Agents.

5. Whether or not the use in trial, to obtain conviction, of incriminating statements surreptitiously elicited from a person while said person is under arrest on a charge different from that for which convicted, and represented by a lawyer, is violative of said person's Constitutional rights.

STATUTES INVOLVED.

The statutory provisions involved are: Title 18, U. S. C., Section 201 (B) (3); Title 26, U. S. C., Section 5301, replacing Title 26, U. S. C., Section 2871 as of July 1, 1959.

STATEMENT.

On August 10, 1963, after surreptitious surveillance by two Internal Revenue Service Alcohol Tax Unit Agents, petitioner was placed under arrest by the agents on a charge of violation of 26 U. S. C., Section 5301, formerly Section 2871, the specific charge being that she refilled liquor bottles in her place of business, a cocktail lounge (R. 30, 74, 115). All of the bottles involved, the ones being refilled, and the ones from which the refilling was being done, were taxed, the tax having been paid (R. 73, 169, 170). At trial, petitioner admitted having refilled taxed liquor bottles from taxed liquor bottles (R. 214). Immediately following her arrest in her place of business, she called her lawyer on the telephone, and the agent that placed her under arrest talked to her lawyer on the telephone advising the lawyer of his, the agent's, intended course of conduct with reference to petitioner (R. 30). Insisting that the petitioner ride alone with him in a government car to the Federal Bldg. in St. Louis for the purpose of being booked (R. 223) the agent Overturf, during the course of the trip, broached the subject of money advising petitioner the possibility of "compromise and settlement" of the charge against her (R. 79). This money conversation initiated by the agent resulted in the agent stopping his car in a vacant lot on the way to the Federal Building for consultation between the petitioner and agent Overturf's colleague who was following in his private car (R. 85, 86). Following this conversation, and

on their arrival at the Federal Building, the evidence obtained at petitioner's place of business was removed from the rear seat of the government car and secreted by the agents in the trunk of the car (R. 89, 163). The day was Saturday, and the requirement was that any person entering the Federal Building had to sign a register in the elevator. The two agents and petitioner entered the elevator, but agent Overturf, doing the signing, signed only his and his colleague's name, omitting to sign petitioner's name (R. 89, 90, 165). In his office, agent Overturf, by his own admission, made a pretense of and faked taking the fingerprints of petitioner (R. 96, 97). Following more conversation with agent Overturf with reference to money and a later contact, petitioner was released on her own recognizance at noontime; one half hour later, at 12:30 P. M., the agents contacted their superior with reference to a bribe attempt (R. 212, 213). The rest of the afternoon was spent by the agents and their superiors setting up recording devices for the anticipated recording of petitioner's bribery attempt (R. 192-214). Petitioner had no further contact with the agents that day until she received a telephone call from agent Overturf at 5:00 P. M., in which call he renewed his solicitation of money (R. 111, 112, 170, 214). With the government cars equipped to record her conversation, petitioner accompanied the agents at about 8:00 P. M. in their car, and, at the urging of agent Overturf, made incriminating statements used to convict her of bribery (R. 182, 243, 244).

Before the Eighth Circuit Court of Appeals, petitioner urged three grounds for reversal of her conviction, i. e., (1) that her original arrest on a charge of refilling taxed liquor bottles from taxed liquor bottles was unlawful and therefore all evidence obtained following that unlawful arrest should have been suppressed, basing the unlawfulness of the arrest on a prior decision of the same Court,

the Eighth Circuit Court of Appeals construing the Federal Statute involved, i. e., Wisniewski v. U. S., 8 Cir., 1957, 247 F. 2d 293; (2) that petitioner was a victim of entrapment as a matter of law by the Federal Agents, and (3) that while she was under arrest and on bond (her own recognizance) and while she was represented by a lawyer, to whom the arresting agent had talked, she was illegally approached by Federal Agents who surreptitiously elicited incriminating statements from her in violation of her Constitutional rights under the Sixth Amendment as construed by the Supreme Court of the United States in Massiah v. U. S., No. 199, May 18, 1964, 32 L. W. 4389.

The Eighth Circuit Court of Appeals rejected petitioner's contentions holding (1a) that the statute under which they had previously held that it was not a crime to refill a taxed liquor bottle from a taxed liquor bottle had been re-written and substantively changed by Congress to make such conduct a crime: (1b) that even if petitioner's arrest in the first instance (the refilling charge) was unlawful, the legality of the first arrest was immaterial since the agents arrested petitioner in the first instance "under color of law" believing that they had the authority to make such arrest, and that evidence obtained pursuant to such unlawful arrest is not poisoned: (2) that the jury's verdict, the jury having been properly instructed, was **completely** dispositive of the defense of entrapment: and (3) that Massiah v. U. S., supra, was inapplicable to petitioner's case since Massiah applies only to statements surreptitiously elicited after indictment and in the absence of counsel in prosecution of the offense for which one is indicted.

REASONS FOR GRANTING THE WRIT.

1a: In Wisniewski v. U. S., supra, the Eighth Circuit Court of Appeals construed Title 26 U. S. C., Section 2871, an Internal Revenue statute, as penal in nature, and as being purely for the protection of revenue, reversing a conviction in view of evidence that the appellant, in pouring taxed liquor into a taxed liquor bottle, had not defrauded the Government of any tax, and his arrest therefore was unlawful; subsequently, on July 1, 1959, Congress re-enacted the statute as Title 26 U. S. C., Section 5301, the statute under which petitioner was arrested, the evidence in petitioner's case clearly showing that she poured taxed liquor into a taxed liquor bottle. The pertinent phraseology of both statutes are almost word for word the same, as follows:

Section 2871 (Wisniewski).	Section 5301a (Vinyard).
Whenever in his judgment such action is necessary **to protect the revenue,** the Secretary is authorized, by the regulations prescribed by him * * * (Emphasis added).	Whenever in his judgment such action is necessary **to protect the revenue,** the Secretary or his delegate is authorized, by the regulations prescribed by him * * * (Emphasis added).

In addition to holding in Wisniewski v. U. S., supra, that the statute under consideration was strictly for the protection of the revenue, the Eighth Circuit Court of Appeals further observed that, l. c. 298:

> "There was a period in our history during which the Federal Government, pursuant to Constitutional authority, attempted to regulate the liquor traffic but since the repeal of the Eighteenth Amendment to the Constitution **government regulations must be limited**

to those necessary to protect the revenue" (Emphasis added).

Although the Eighth Circuit Court of Appeals refers to a Senate Committee hearing in its opinion (pp. 9-10), the new statute, Section 5301, as written, fails to apprise any reader of any intent to change the meaning of the statute as regards the construction put on the predecessor statute, Section 2871 in Wisniewski; if the intent of Congress was to change the substantive effect and law of the statute, the failure of Congress to do so is obvious by a comparison of the phraseology of the prologue to both Sections 2871 and 5301a as above quoted.

Since there has been no amendment to the Constitution empowering the Federal Government to regulate liquor traffic, the same construction accorded Section 2871 must be accorded Section 5301, and it was therefore no crime for petitioner to pour taxed liquor into a taxed liquor bottle since the Government was not defrauded of any tax. The evidence, her statements, obtained pursuant to her unlawful arrest under Section 5301 and directly derived from such unlawful arrest, should have been suppressed as the fruit of official illegality. Wong Sun and James Wah Toy v. U. S., 83 S. Ct. 407.

1b: The Eighth Circuit Court of Appeals held (p. 11) that even if her original arrest was unlawful, still that unlawfulness was immaterial since the arrest was made by agents **under color of law.**

The police stratagem of "color of law" is a subjective theory that requires re-examination by this Court. Federal agents and police generally are professionals and should be required to **know** the law they are enforcing. "Color of law" is a state of mind of the enforcing agent impossible of objective confirmation or denial. It confers on the agent or policeman the ultimate power to decide what is or is not a violation of law with no penalty for

lack of honest and intelligent decision or judgment inuring to the agent or policeman—and with no recourse to the individual arrested to counteract the erosive effect of this subjective philosophy on his or her rights under the Fourth Amendment. To permit and condone the "color of law" theory resulting in the unlawful arrest of an individual who, as far as the written law is concerned can legitimately believe that she is committing no crime—see Wisniewski v. U. S., supra, l. c. 299[1]—is to unduly instill fear and apprehension of the Federal Government in citizens and actually promote the crime of bribery. The "color of law" theory is simply an excuse for police inefficiency and an avoidance of individual rights guaranteed under the Fourth Amendment.

2: Although the Eighth Circuit Court of Appeals held (p. 15) that the jury's verdict, the jury being properly instructed, was **completely** dispositive of the defense of entrapment, a consideration of entrapment **as a matter of law** necessarily requires a review of the evidence. Sherman v. U. S., 78 S. Ct. 819. Prior to her arrest on August 10, 1963, petitioner was a business person of unblemished character, a factor pertinent to this consideration. The first mention of money was admittedly by agent Overturf by way of compromise and settlement; the conduct of the agents thereafter was indeed unorthodox: with a prisoner in tow, they stopped on a vacant lot on the way to the Federal Building to further discuss money, they secreted evidence not in the building in an

[1] In Wisniewski v. U. S., supra, l. c. 299, the Eighth Circuit Court of Appeals stated:

> "The defendant here had two brands of distilled liquor on each of which the tax had been fully paid. Was he not warranted in construing this regulation to mean that no fraud on the revenue could possibly result by mixing these two brands of liquor on both of which the tax had been paid? * * * We conclude that the Court should have granted defendant's motion for a judgment of acquittal interposed at the close of all the evidence."

evidence locker but in the trunk of their car, they omitted to sign petitioner's name to the elevator registry, they faked taking her fingerprints and in releasing her made arrangements with her to meet later in the day for the money. Agent Overturf himself re-initiated the later contact after elaborate electronic preparation during which incriminating statements were elicited from petitioner. The zeal with which the agents went about luring petitioner into the commission of the crime of bribery is best exemplified by the testimony of agent Overturf himself, on page 81 of the trial record, and on page 82 of the trial record. A clear design by this testimony is shown on the part of the agents "to incite to and create crime for the sole purpose of prosecuting and punishing it". Sorrels v. U. S., 53 S. Ct. 210, l. c. 213.

3: Almost from the moment of her arrest in the first instance, petitioner was represented by a lawyer, a fact well-known to the agents (R. 30). The incriminating statements used to convict petitioner were elicited from her **while she was under arrest** and out on bond (her own recognizance), and while she was represented by counsel. The Eighth Circuit Court of Appeals construed the opinion of this Court in Massiah v. U. S., supra, on page 17 of its opinion as requiring, for the application of Massiah, that the statements be used "in prosecution of the offense for which he had been indicted". The distinction as drawn by the Court of Appeals must fail, firstly, for the reason that Massiah was tried on a second superseding indictment returned in March, 1961, while the surreptitiously elicited incriminating statements used to convict him in the trial on this second superseding indictment were obtained by federal agents in 1958, three years previous, on an entirely different indictment. See footnote 4, Massiah v. U. S., 32 L. W. 4390. The statements were, therefore, not used "in prosecution of the offense for which he had been indicted" at the time the

statements were elicited, but, as in the petitioner's case, were used to obtain conviction in prosecution of a different offense. Secondly, inherent in the opinion of the Eighth Circuit Court of Appeals is the inference that Massiah v. U. S. contains a conjunctive requirement, i. e., "after indictment **and** in the absence of counsel". Indictment is not a condition precedent to the application of Massiah, BUT absence of counsel is; in Massiah v. U. S., supra, this Court construed the Sixth Amendment, i. e., "In **all** criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." Indictment, a state in criminal prosecution, is not singled out as the magical plateau at which rights attach to the accused; the pertinent requirement is the right to the assistance of counsel in **all** criminal prosecutions. Herein the petitioner correctly availed herself of counsel at the very outset only to be illegally, and unethically, approached by Federal agents who well knew of her representation by counsel. Massiah v. U. S., supra, does apply to petitioner's case, and the statements obtained by Federal agents under the circumstances could not constitutionally be used against her at her trial.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

.....

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APPENDIX A.

Statutes.

Title 26, U. S. C., Section 5301:

(a) Requirements.—Whenever in his judgment such action is necessary to protect the revenue, the Secretary or his delegate is authorized by the regulations prescribed by him and permits issued thereunder if required by him—

(1) to regulate the kind, size, branding, marking, sale, resale, possession, use, and reuse of containers (of a capacity of not more than 5 wine gallons) designed or intended for use for the sale of distilled spirits (within the meaning of such term as it is used in section 5002 (a) (6)) for other than industrial use; and

(2) to require, of persons manufacturing, dealing in, or using any such containers, the submission to such inspection, the keeping of such records, and the filing of such reports as may be deemed by him reasonably necessary in connection therewith.

Any requirements imposed under this section shall be in addition to any other requirements imposed by, or pursuant to, law and shall apply as well to persons not liable for tax under the internal revenue laws as to persons so liable.

(b) Disposition.—Every person disposing of containers of the character used for the packaging of distilled spirits shall, when required by the Secretary or his delegate, for protection of the revenue, render a correct return, in such form and manner as the Secretary or his delegate may by regulations prescribe, showing the name and address of

the person to whom each disposition was made, with such details as to the quantities so disposed of or other information which the Secretary or his delegate may require as to each such disposition. Every person required to render a return under this section shall keep such records as will enable such person to render a correct return. Such records shall be preserved for such period as the Secretary or his delegate shall by regulations prescribe, and shall be kept available for inspection by any internal revenue officer during business hours.

(c) Refilling of liquor bottles.—No person who sells, or offers for sale, distilled spirits, or agent or employee of such person, shall—

(1) place in any liquor bottle, any distilled spirits whatsoever other than those contained in such bottle at the time of stamping under the provisions of this chapter; or

(2) possess any liquor bottle in which any distilled spirits have been placed in violation of the provisions of paragraph (1); or

(3) by the addition of any substance whatsoever to any liquor bottle in any manner alter or increase any portion of the original contents contained in such bottle at the time of stamping under the provisions of this chapter; or

(4) possess any liquor bottle, any portion of the contents of which has been altered or increased in violation of the provisions of paragraph (3);

except that the Secretary or his delegate may by regulations authorize the reuse of liquor bottles, under such conditions as he may by regulations prescribe, if the liquor bottles are to be again stamped under the provisions of this chapter. When used in this subsection the term "liquor bottle" shall mean a liquor bottle or other con-

tainer which has been used for the bottling or packaging of distilled spirits under regulations issued pursuant to subsection (a).

Tit. 26, § 2871:

§ 2871. Regulation of traffic in containers of distilled spirits.

Whenever in his judgment such action is necessary to protect the revenue, the Secretary is authorized, by the regulations prescribed by him, and permits issued thereunder if required by him (1) to regulate the size, branding, marking, sale, resale, possession, use and re-use of containers (of a capacity of less than five wine-gallons) designed or intended for use for the sale at retail of distilled spirits (within the meaning of such term as it is used in section 2803) for other than industrial use, and (2) to require, of persons manufacturing, dealing in, or using any such containers, the submission to such inspection, the keeping of such records, and the filing of such reports as may be deemed by him reasonably necessary in connection therewith. Whoever willfully violates the provisions of any regulation prescribed, or the terms or conditions of any permit issued, pursuant to the authorization contained in this section, and any officer, director, or agent of any corporation who knowingly participates in such violation, shall, upon conviction, be fined not more than $1,000 or be imprisoned for not more than two years, or both; and, notwithstanding any criminal conviction, the containers involved in such violation shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for forfeitures, seizures, and condemnations for violations of the internal revenue laws, and any such containers so seized and condemned shall be destroyed and not sold. Any requirements imposed under this section shall be in addition to any other requirements imposed by, or pursuant to, law, and shall apply as well

to persons not liable for tax under the internal revenue laws as to persons so liable. 53 Stat. 331.

18 U. S. C. A., § 201 (b) (3), provides:

"(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

* * * * * * *

"(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty * * *

* * * * * * *

"Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States."

APPENDIX B.

Opinion and Judgment Below.

United States Court of Appeals
For the Eighth Circuit.

No. 17,556.

Irene Ethel Vinyard, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[August 12, 1964.]

Before Vogel, Matthes and Ridge, Circuit Judges.

Vogel, Circuit Judge.

Appellant was indicted for and convicted by a jury of violating the provisions of 18 U. S. C. A., § 201 (b) (3),[1] in

[1] 18 U. S. C. A., § 201 (b) (3), provides:

"(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

* * * * * * * *

"(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty * * *

* * * * * * * *

"Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States."

that she offered, and gave, a bribe to two agents of the government after they had arrested her for alleged violation of the Internal Revenue laws. Appellant received a sentence of six months and a $500 fine. Because of the nature of this appeal, the facts are set out here in some detail.

On August 10, 1963, appellant was arrested by agents of the Treasury Department for refilling of liquor bottles in violation of 26 U. S. C. A., § 5301 (c).[2] The facts relating to that arrest which are pertinent to this opinion are as follows: In the very early morning hours of August 10, 1963, Gene L. Overturf, a criminal investigator with the Federal Alcohol and Tobacco Tax Division, and Jack A. Wallace, a Special Agent with the Intelligence Division of the Internal Revenue Service, entered the 61 Lounge, an establishment owned by appellant in St. Louis, Missouri. While there,

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[2] 26 U. S. C. A., § 5301 (c), provides:

"*Refilling of liquor bottles.*—No person who sells, or offers for sale, distilled spirits, or agent or employee of such person, shall—

"(1) place in any liquor bottle any distilled spirits whatsoever other than those contained in such bottle at the time of stamping under the provisions of this chapter; or

"(2) possess any liquor bottle in which any distilled spirits have been placed in violation of the provisions of paragraph (1); or

"(3) by the addition of any substance whatsoever to any liquor bottle, in any manner alter or increase any portion of the original contents contained in such bottle at the time of stamping under the provisions of this chapter; or

"(4) possess any liquor bottle, any portion of the contents of which has been altered or increased in violation of the provisions of paragraph (3);

except that the Secretary or his delegate may by regulations authorize the reuse of liquor bottles, under such conditions as he may by regulations prescribe, if the liquor bottles are to be again stamped under the provisions of this chapter. When used in this subsection the term 'liquor bottle' shall mean a liquor bottle or other container which has been used for the bottling or packaging of distilled spirits under regulations issued pursuant to subsection (a)."

upon a pretense to the bartender concerning "a little argument about the proof of the bottle", the agents surreptitiously marked, for their own later identification, a Cutty Sark scotch bottle and a Seagram V. O. bottle, which bottles were nearing the empty mark. The agents returned to the 61 Lounge later that same morning, at approximately 9:00 a. m. Based upon watching appellant carry a marked bottle, which at this time was empty, to a rear storeroom and her return with four of them filled, Agent Overturf placed her under arrest. The testimony of Overturf on direct examination discloses that, at the time of arrest, the following transpired:

"Q. What else, if anything, did you do, sir, at that time?

"A. At this time, noting that the two bottles were now full, I told Mrs. Vinyard that she was under arrest for violation of the Internal Revenue law for refilling her whisky bottles.

"Q. What else did you do?

"A. Mrs. Vinyard said, 'May I call my attorney?' And I said, 'Yes. Go ahead.'

"Q. Did she, at that time, make a telephone call?

"A. She, at that time, placed a telephone call right from behind the bar.

"Q. Were you able to hear what she said?

"A. She spoke, and she said that, 'I have just been arrested,' and she said, 'I don't know. I think it is for refilling the bottles.' She said, 'The man on the telephone wants to talk to you.'

"Q. And did you talk to the man on the telephone?

"A. Mrs. Vinyard handed me the telephone, and [the] man identified himself as her attorney, as a Mr. Maloney."

Following the telephone call the agents took into their possession several of the bottles as evidence. Appellant

was then informed that she would be taken to the Federal Building in St. Louis, and the three began the drive to that building with appellant riding with Agent Overturf in a government vehicle and Agent Wallace following behind in his private car. It was during the drive to the Federal Building, the government contended, that appellant first approached Overturf concerning the possibility of a bribe.

Viewing the evidence in a light most favorable to the government, as we must do **Smith v. United States**, 8 Cir., 1964, 331 F. 2d 265, 278; **Slocum v. United States**, 8 Cir., 1963, 325 F. 2d 465, 468; **Thogmartin v. United States**, 8 Cir., 1963, 313 F. 2d 589, 590; **Koop v. United States**, 8 Cir., 1961, 296 F. 2d 53, 54, the record indicates that the following conversation occurred between appellant and Overturf, as testified to by the latter:

"Q. Did you have a conversation with her at that time, sir?

"A. Yes, sir.

* * * * * * *

"Q. What was the conversation that you had with her, sir?

"A. At this time, Mrs. Vinyard said, 'Isn't there some way we can settle this?' I said, 'Yes. Have your attorney contact the United States Attorney and see about getting an offer in compromise in lieu of criminal liability.' I said, 'We have had five or six of these cases recently, and most of them have been settled under submission of an offer of compromise in the amount of $500.00.'

* * * * * * *

"A. She said, 'Yes, but what about the State?' I said, 'Well, we cooperate with the State, and they get a copy of our report.' * * *

* * * * * * *

"A. She said, 'Well, I am not worried about the Federal Government. I am worried about the State.' She said, 'Can't we settle this among ourself?' [sic] I said, 'What do you mean?' She said, 'You give me the whiskey and the papers back and forget about it.' She said, 'I know you fellows don't make much money and you can sure use the money.'

* * * * * * * *

"A. * * * She said, 'I mean can't we settle this between you and I?' I said, 'Miss Vinyard, I got a responsible position. I have only got a few years to go to retire.' I said, ' I can't jeopardize my position like this.' She said, 'Well, no one will know about it but you and me. All you got to do is give me the whiskey and papers and not make a report that you have ever been to my place.'

"She said, 'I am not afraid of the Federal Government.' She said, 'I am afraid of the State.' She said, 'I can't afford to be closed up.' She said, 'You can use the money more than the United States Government can, and only you and I will know it.'

"Q. And what, if anything, did you say to her, sir?

"A. I said, 'Well, how about my partner Wallace? He'll know it,' and she said, 'Well, you talk to him.' So about this point here we are in the vicinity of Beaumont and Olive Street.

"Q. What, if anything, did you do at that time, sir?

"A. I motioned Wallace to follow in behind me. I turned right and pulled up on a parking lot at Beaumont and Pine."

The record further discloses that while the automobiles were temporarily parked at this location, appellant repeated her offer of a bribe to Agent Wallace.

Upon arrival at the Federal Building, Wallace placed the bottles in the locked trunk of the government vehicle.

They then entered the building and rode the elevator to their office. Since this was a Saturday, those persons entering the building were required to sign a form in the elevator stating their name, room destination and time in and time out. Overturf signed his name and Wallace's but did not sign in for appellant, later claiming that it had never been required of him to sign in prisoners. During the time the agents and appellant were in the Alcohol and Tobacco office, appellant's personal history was recorded and a pretense of taking her fingerprints was made. With regard to the fingerprint matter, the testimony of Overturf indicates that the following transpired:

> "A. * * * but when I took her over to the fingerprin' stand, she said, 'Well, if we are going to settle this among ourself, [sic] why do you have to take fingerprints?'
>
> "Q. What did you say, if anything, then, sir?
>
> "A. I said, 'Well, I don't know. We are going to have to make this look, appear good, because if you go right back to the bar without being fingerprinted, people are going to know something has went wrong here.' She said, 'Can't you just put a little ink on my finger and rub it off?' I said, 'Well, that's all right with me.' * * *."

Following those procedures in the office, appellant was released on her personal recognizance. The record discloses that the above-described actions of Overturf and Wallace were motivated by their intention to stall for time in order to "notify the Inspection Service before any money" was passed on the offer.

Very shortly after the agents released appellant, Overturf called Inspector Gene Walter Blackwelder of the Internal Revenue Inspection Service at approximately 12:30 p. m., August 10, 1963. Thomas L. French, a Supervisory Internal Revenue Inspector, was also contacted. The in-

vestigatory personnel then spent the afternoon at Overturf's home preparing Minifon Wire Recorders to be concealed on the persons of Overturf and Wallace, and a tape recorder which was secreted in a briefcase. At approximately 5:30 p. m. Overturf called appellant to ask if she had the money ready and to make an appointment with her to collect it that evening.

Prior to meeting appellant later that evening, Agents Overturf and Wallace were searched and were equipped with the Minifon recording devices. The tape recorder hidden in a briefcase was placed on the rear seat of their automobile and the automobile two-way radio was activated for audio confirmation of any conversation which might take place within the car.

At approximately 8:00 that evening the agents met appellant at the 61 Lounge and she then rode with them in their automobile to a nearby parking lot. Upon a preplanned guise that Wallace was still not convinced that he should accept the bribe, appellant was led to repeat her offer and made several incriminating statements which were recorded and which were admitted at the trial. She then gave envelopes, each containing $250, to both Overturf and Wallace. Thereupon appellant was arrested on the charge of bribery for which she has been convicted.

Three separate grounds for reversal of appellant's conviction are urged:

1. That her arrest in the first instance was unlawful and accordingly all evidence should have been suppressed and the indictment dismissed, basing the claim of unlawful arrest on this court's opinion in **Wisniewski v. United States**, 8 Cir. 1957, 247 F. 2d 293.

2. That as a matter of law appellant was a victim of entrapment by agents of the government and her motions

for judgment of acquittal on this ground should have been sustained.

3. That under the rule recently announced by the Supreme Court in **Massiah v. United States**, No. 199, May 18, 1964, 32 L. W. 4389, the incriminating statements made by appellant following her arrest and which she was induced to repeat for surreptitious recording, all occurring after appellant had retained counsel, were improperly received into evidence contrary to the provisions of the Sixth Amendment.

As to appellant's first claimed error, it should be noted that the judgment of conviction which was reversed by this court in **Wisniewski v. United States**, supra, was based on a finding of a violation of a **regulation** then in effect which was issued by the Secretary of the Treasury on the theory that he found it "necessary to protect the revenue". The regulation then in effect, violation of which Wisniewski was found guilty in the District Court, provided as follows:

> "Reuse of containers. No liquor bottle or other authorized container shall be reused for the packaging of distilled spirits except as provided in Sec. 175.62, nor shall the original contents, or any portion of such original contents, remaining in a liquor bottle or other authorized container be increased by the addition of any substance."

The statute which authorized the Secretary of the Treasury to promulgate regulations such as the above "whenever in his judgment such action is necessary to protect the revenue" was 26 U. S. C. A. § 2871 [I. R. C. 1939],[3] the pertinent parts of which were determined by the court, 247 F. 2d at 295, to be:

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[3] The corresponding section in the 1954 Internal Revenue Code prior to the 1958 amendment was 26 U. S. C. A., § 5214.

"Whenever in his judgment such action is necessary to protect the revenue, the Secretary is authorized, by the regulations prescribed by him * * * (1) to regulate the size, branding, marketing, sale, resale, possession, use, and reuse of containers * * * designed or intended for use for the sale at retail of distilled spirits * * *. Whoever willfully violates the provisions of any regulation prescribed, or the terms or conditions of any permit issued, pursuant to the authorization contained in this section, and any officer, director, or agent of any corporation who knowingly participates in such violation, shall, upon conviction, be fined not more than $1,000, or be imprisoned for not more than two years, or both * * *."

In reversing the **Wisniewski** conviction, this court held, in effect, that the defendant's act of increasing the original contents of a marked liquor bottle by an addition of distilled spirits upon which a tax had been paid did not constitute a violation of a regulation promulgated "to protect the revenue" and that the regulation prohibiting an increase by addition of **any substance** to the original contents of a liquor bottle or other authorized container applied only to substances, including distilled liquors, on which a tax is due.

Approximately one year after **Wisniewski** was decided, September 2, 1958, Congress amended the statute and recodified it as 26 U. S. C. A. § 5301(c), the text of which is set out in f. n. 2, supra, and the effective date of which was July 1, 1959. The new statute encompassed both the old law and the prior regulation and included certain key words as indicated in that portion of the legislative history quoted **infra**. The Report of the Senate Committee on Finance, Report No. 2090, published in 1958 U. S. Code Cong. and Ad. News 4395, specifically mentions **Wisniewski** and expresses quite clearly an intent to circumvent that

decision. In discussing the intended effect of the amendment, the committee stated in its report at page 4563 of 1958 U. S. Code Cong. and Ad. News:

> "The regulations prescribed under existing law * * * have recently been restrictively construed in certain court decisions. The use of the word 'whatsoever' in the phrases 'any distilled spirits whatsoever' and 'any substance whatsoever' **makes it completely clear that the construction given to the regulations under existing law in U. S. v. Goldberg, et al.** (8 Cir., 1955, 255 F. 2d 180) and in **Wisniewski v. U. S.** (8 Cir., 1957, 247 F. 2d 292), **does not apply with respect to the provisions of this subsection.** The language of this subsection as contained in the House bill and as restated by your committee **is intended to obviate any question that its provisions are applicable, whether or not the tax has been paid or determined on the distilled spirits used in refilling and whether or not the substance used to alter the original contents is taxable under the internal revenue laws.**" (Emphasis supplied.)

The 1958 amendment and the legislative history quoted above clearly reflect a congressional intent to make criminal the act for which appellant here was initially arrested. Our **Wisniewski** opinion based upon the violation of a regulation no longer in effect and replaced by a statute specifically enacted to avoid **Wisniewski**, can be of no help to the appellant.

We find no substance to appellant's assertion that **Wisniewski** was expressly affirmed by this court after the 1958 amendment in **Blumenfield v. United States**, 8 Cir., 1962, 306 F. 2d 892, 900. Not only is **Blumenfield** factually distinguishable from **Wisniewski** and the instant case, but the acts upon which the conviction in **Blumenfield** was based occurred prior to the effective date of the 1958 amendment.

Even if we assume, *arguendo*, that the initial arrest for refilling of liquor bottles was unlawful, the legality of that arrest is immaterial in a prosecution for the subsequent bribery of the arresting officer. When the agents entered the appellant's bar they did so under color of law. They believed they had the authority and the duty to make an arrest, having observed violations of § 5301 (c) which they believed to be valid. When Mrs. Vinyard offered the $500 bribe, she knew that Overturf and Wallace were agents of the United States government and were acting in their official capacity. For the payment of $500 she attempted to get them to not make a report of their observations, to return to her the evidence they had seized at her place of business and to give her the notes they had prepared during interviews with her. **United States v. Troop**, 7 Cir., 1956, 235 F. 2d 123, dealt with a somewhat similar situation. The court said there, at page 124:

> "On this appeal the principal reliance of defendant is that the evidence does not sustain a charge of bribery under § 201, Title 18 U. S. Code. Defendant argues that as the search warrant was invalid there was no matter then pending before Agent Emrich in his official capacity, hence said § 201 does not apply. We do not agree.
>
> "When the Narcotic Agents, including Emrich, entered the apartment at 2004 South State Street, they did so under color of authority. They believed they had authority to search the premises. When defendant offered a bribe of $1500.00 he believed and understood the Agents were officers of the United States and were acting in their official capacities. Defendant endeavored to persuade the agents to act in violation of their official duties.
>
> • • • • • • •
>
> "We hold the offense of attempted bribery of a Federal Officer is complete upon the tender of the

bribe to such Officer with intent to influence his decisions and acts in an official capacity. We think it is entirely immaterial that for some reason, subsequently determined, the Officer could not have brought about the result desired by the person offering the bribe. We think the authorities are in accord."

The court then cited and quoted with approval from **Kemler v. United States**, 1 Cir., 1942, 133 F. 2d 235, where that court said at page 238:

> "The clear purpose of the statute is to protect the public from the evil consequences of corruption in the public service. **Thus the gravamen of the offense described therein is the giving or offering of a bribe to a person acting on behalf of the United States for the purpose of influencing official conduct.** Obviously no one would give or offer a bribe unless he expected to gain some advantage thereby, and since attempting to gain an advantage by this means is the evil which the statute is designed to prevent, it can make no difference if after the act is done the doer discovers that for some reason or another, be it a mistake on his part or a mistake on the part of some officer or agency of the United States, there was actually no occasion for him to have done it. **The statute is violated when a bribe is given or an offer to bribe is made regardless of the occasion therefor, provided it is done with the requisite intent and provided the acceptor or the offeree of the bribe is a person of the sort described in the statute**" (Emphasis supplied).

The general rule is stated in 12 Am. Jur. 2d § 13, p. 757, as follows:

> "In determining the criminality of an act as bribery it is immaterial that the official action or measure taken, or expected or promised to be taken, under the

influence of the bribe would be invalid because the officer had no authority to do the act in question, or would be invalid because the authorizing statute or executive order was invalid. * * *"

See, also, 11 C. J. S., Bribery, pp. 850-851:

"It is not essential that the official action induced by the bribe be lawful; it is sufficient that it is official in form and done under color of office, so that the offer, or receipt by an authorized officer, of a bribe to release one from arrest is criminal without regard to the legality of the arrest.

"The official act influenced by the bribe need not be lawful to render one liable for bribery, but need only be official in form, and done under color of office. In other words, as long as the officer's act has actual relation to his official employment, it is immaterial that the law imposes no duty on him to act or that he has no direct authority to act. Thus it is not necessary, in order to constitute bribery, that the public official be influenced in regard to a measure which can be legally enforced.

"**Legality of arrest.** Although there is authority that one who offers to bribe an officer to release a person from arrest is not guilty of bribery unless the arrest was a legal one, it has been held that the acceptance of a bribe in such a situation is criminal regardless of whether the officer had the duty to arrest, whether the prisoner had previously been indicted and a warrant issued for his arrest, or whether the person arrested had in fact committed an offense. Likewise, an offer of a bribe not to make an arrest is criminal regardless of guilt of the person of the offense for which he was apprehended, and it is not a defense that the law under which the arrest was about to be made was invalid, or was later changed

so as not to include the offense in question; nor can accused contest the regularity of the search warrant or the validity of the indictment afterward returned for the offense for which the arrest was made. • • •"

See, also **People v. Guillory**, 1960, 178 Cal. App. 2d 854, 3 Cal. Rptr. 415, 80 A. L. R. 2d 1077, 1079, 1080.

Accordingly, we hold that legality of the first arrest was not an essential prerequisite to conviction for a violation of the Bribery Statute based on happenings occurring subsequent to such arrest.

Appellant's next contention that the trial court erred in refusing to rule in her favor on her asserted defense of entrapment as a matter of law is equally without merit. The well-established rule in the federal courts in the defense of entrapment when the evidence is in conflict was briefly but accurately described in the following:

Hunt v. United States, D. C. Cir., 1958, 258 F. 2d 161, 162:

"• • • [Appellant's] defense is that he was entrapped into these acts by the police agent. The testimony was conflicting; appellant's evidence arguably made out entrapment as a matter of law and the Government's evidence negated entrapment as a matter of law. The instructions were free of prejudicial error, and thus the jury's verdict indicating belief of the Government's version of the transactions is conclusive."

United States v. Holmes, 3 Cir., 1948, 168 F. 2d 888, 891:

"Defendant contends that • • • entrapment exists. It is sufficient to note, however, that the court instructed the jury concisely and adequately concerning the elements of entrapment, and that the jury verdict is dispositive of the issue. See **United States v. Brand-**

enburg, 3 Cir., 1947, 162 F. 2d 980, 981, 982, cert. denied 1947, 332 U. S. 769, 68 S. Ct. 80."

See, also, **United States v. De Normand**, 2 Cir., 1945, 149 F. 2d 622, 624.

We have carefully examined the record here and find that entrapment has not been shown as a matter of law. The evidence on that issue was conflicting. Appellant testified that the idea of offering a bribe did not originate in her mind, while the government's witnesses testified that it did. The court fully and fairly instructed the jury on entrapment. No objection was made thereto and no proper exception was taken to the charge. Accordingly, the jury's verdict of guilty is completely dispositive of the asserted defense. **Roth v. United States**, 8 Cir., 1959, 270 F. 2d 655; **Hunt v. United States; United States v. Holmes; United States v. De Normand**, all supra.

For her third claimed error, appellant cites and relies on the recent opinion of the Supreme Court in **Massiah v. United States**, No. 199, May 18, 1964, 32 L. W. 4389, and urges the application here of the exclusionary rule there announced, in that case the petitioner was indicted for violating the narcotic laws. He retained a lawyer, pleaded not guilty and was released on bail. While he was free on bail, a federal agent, by surreptitious means (the installation of a radio transmitter in the automobile of a co-defendant with the latter's consent) listened to incriminating statements made by the petitioner. Petitioner was convicted. The Court of Appeals for the Second Circuit, with one judge dissenting, **United States v. Massiah**, 2 Cir., 1962, 307 F. 2d 62, affirmed. Certiorari was granted "to consider whether, under the circumstances here presented, the prosecution's use at the trial of evidence of the petitioner's own incriminating statements deprived him of any right secured to him under the Federal Constitution. 374

U. S. 805." In reversing, with three Justices dissenting, the court stated (32 L. W. 4390):

> "Here we deal not with a state court conviction, but with a federal case, where the specific guarantee of the Sixth Amendment directly applies.[6] ([6]" 'In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.' ") **Johnson v. Zerbst**, 304 U. S. 458. **We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.** * * *" (Emphasis supplied.)

Appellant seeks to have the rule of **Massiah** do service for her herein. We think **Massiah** may not be so construed. When appellant was first arrested, the charge for which the arrest was made was the refilling of bottles in violation of 26 U. S. C. A. § 5301 (c). At that time she employed an attorney to represent her for the purpose of defending against the refilling charge. When she, thereafter, made her first offer to Overturf and Wallace to pay them $500 to return the evidence seized, drop any charge and release her, she was committing a different and separate offense—that of attempted bribery. The receipt into evidence of the testimony of Overturf and Wallace as to what occurred was entirely proper, even though she was represented at the time by an attorney in connection with the first offense, that for which she had been arrested. To hold otherwise is to say that a person arrested for one offense (refilling of bottles in violation of 26 U. S. C. A. § 5301 (c)) may not be held accountable for the commission of a subsequent and different offense (bribery, in violation of 18 U. S. C. A. § 201) unless his counsel, employed in the refilling of bottles offense, is present and presum-

ably approving of the acts constituting the attempted bribery offense. It would be holding that the employment of counsel in the first offense gave appellant an insulated status against the commission of subsequent crime or immunized him from responsibility for his subsequent criminal acts. That is not the meaning of **Massiah.** Its ruling is limited to holding, as constitutionally improper, the receipt into evidence of statements surreptitiously elicited from a defendant after indictment and in the absence of his counsel, such statements intended to be used in prosecution of the offense for which he had been indicted. Like reasoning applies to the acceptance into evidence of the recordings of appellant's statements which repeated or reaffirmed her prior attempted bribery, this time with seeming success in the passage of two envelopes, each containing $250 in cash.

As to the propriety of accepting into evidence offers to bribe made in private, but surreptitiously recorded, so that they could be used to verify or confirm the offer, the Supreme Court in **Lopez v. United States,** 1963, 373 U. S. 427, 438, said:

> "• • • We decline to hold that whenever an offer of a bribe is made in private, and the offeree does not intend to accept, that offer is a constitutionally protected communication."

Therein, the petitioner claimed that the admission of a wire recording of his conversation surreptitiously made and without his knowledge was a violation of his constitutional rights. The Supreme Court stated, at page 439 of 373 U. S.:

> "Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of

impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording.''.

In a separately concurring opinion, Chief Justice Warren said at page 442 of 373 U. S.:

> ''• • • The only purpose the recording served was to protect the credibility of Davis against that of a man who wished to corrupt a public servant in the performance of his public trust. I find nothing unfair in this procedure. Tax agents like Agent Davis are required to examine the tax returns of suspected tax evaders as a necessary part of our national taxation system. Many of these taxpayers interviewed are integral parts of the underworld. In the performance of their duty, agents are thus often faced with situations where proof of an attempted bribe will be a matter of their word against that of the tax evader and perhaps some of his associates. They should not be defenseless against outright denials or claims of entrapment, claims which, if not open to conclusive refutation, will undermine the reputation of the individual agent for honesty and the public's confidence in his work. Where confronted with such a situation, it is only fair that an agent be permitted to support his credibility with a recording as Agent Davis did in this case.''

Cf. United States v. Beno, 2 Cir., decided May 28, 1964, ... F. 2d ..., and **United States v. Guerra**, 2 Cir., decided June 5, 1964, ... F. 2d ....

Obviously, the situation here does not require that we pass upon the question of whether, had the appellant been

tried on the initial charge of refilling liquor bottles, evidence obtained after she had retained counsel for the defense thereof and in the absence of that counsel, but before indictment, could have been used to convict her of that charge.

Finding no error in the record and concluding that appellant received a fair trial, we affirm the judgment of conviction.

A true copy.

Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C.

Conflicting Opinion.

Theodore Wisniewski, Appellant,

v.

United States of America,
Appellee.

No. 15517.

United States Court of Appeals
Eighth Circuit.

Aug. 12, 1957.

Rehearing Denied Oct. 7, 1957.

Defendant was convicted of violating treasury regulation prohibiting reusing marked liquor bottles for packaging of distilled spirits. The United States District Court for the District of Minnesota, Edward J. Devitt, J., rendered judgment, and defendant appealed. The Court of Appeals, Gardner, Chief Judge, held that defendant's act of increasing original contents of marked liquor bottle by an addition of distilled spirits, upon which tax had been paid, did not constitute violation of provision of regulation prohibiting increasing contents of liquor bottle by addition of any substance.

Judgment reversed and cause remanded with directions to enter judgment of acquittal.

1. Criminal Law Key 1144 (13)

On review of verdict of guilty, evidence must be viewed in light most favorable to government, giving government benefit of all favorable inferences that might reasonably be drawn from facts proven.

2. Internal Revenue Key 2453

In prosecution for reusing marked liquor bottles for packaging of distilled spirits, evidence was sufficient to warrant jury in finding defendant responsible for adding brand of distilled liquor to other liquor contained in marked liquor bottles. 26 U. S. C. A. (I. R. C. 1939), § 2871.

3. Internal Revenue Key 2404

If regulation, issued under statute authorizing Secretary of Treasury to promulgate regulations relative to traffic in containers of distilled spirits and providing that whoever willfully violates regulations shall, upon conviction, be fined not more than $1,000, or be imprisoned for not more than two years, or both, were authorized, it would have force and effect of criminal statute, and would be strictly construed in favor of person accused of violating it. 26 U. S. C. A. (I. R. C. 1939), § 2871.

4. Intoxicating Liquors Key 2

Since the repeal of the Eighteenth Amendment, government regulations with reference to liquor traffic must be limited to those necessary to protect the revenue. U. S. C. A., Const. Amend. 18.

5. Internal Revenue Key 2404

Regulation of Secretary of Treasury prohibiting increase by addition of any substance to original contents of liquor bottle or other authorized container applies only to substances, including distilled liquors, on which tax is due. 26 U. S. C. A. (I. R. C. 1939), § 2871.

6. Constitutional Law Key 48

Where a statute is fairly susceptible of two constructions, one of which will give effect to statute while the

other will defeat it, it is duty of court to adopt one which will save and not destroy it.

7. Interral Revenue Key 2404

Defendant's act of increasing contents of liquor bottle by addition of distilled spirits, upon which tax had been paid, did not constitute violation of provision of treasury department regulation prohibiting increasing contents of liquor bottle by addition of any substance. 26 U. S. C. A. (I. R. C. 1939), § 2871.

T. H. Wangensteen, Minneapolis, Minn., for appellant.

Clifford Janes, Asst. U. S. Atty., St. Paul, Minn. (George E. MacKinnon, U. S. Atty., St. Paul, Minn., on the brief), for appellee.

Before Gardner, Chief Judge, and Woodrough and Vogel, Circuit Judges.

Gardner, Chief Judge.

Appellant was indicted, tried and convicted on an indictment containing two counts, each charging a violation of a regulation of the Secretary of the Treasury, 26 C. F. R., Sec. 175.121, 1952 Cumulative Pocket Supp., by reusing marked liquor bottles for the packaging of distilled spirits.

In the course of this opinion we shall refer to the appellant either as the defendant or the accused.

At all times pertinent to the issues here involved defendant was a retail, on-sale liquor dealer in Minneapolis, Minnesota. The case was before this court on a former appeal reported at 225 F. 2d 180 under the title of United States v. Goldberg. It was one of several cases which were submitted to us together. The only question before us on the former appeal was the sufficiency of the indictments.

Historically, it may be observed that this and companion cases referred to in the former appeals to this court were initially considered together by the trial court. The original indictments were on motion held by Judge Nordbye to be insufficient to state a public offense because the indictments merely charged the alleged offenses in the words of the regulation, charging only that the defendants wilfully and unlawfully reused marked liquor bottles "and increased the original contents of said marked liquor bottles by the addition of a substance." United States v. Goldberg, D. C. Minn., 123 F. Supp. 385, 386. Thereafter, new indictments were returned, of which, with one exception, so far as the issues here involved are concerned, the indictment in the present case may be taken as typical. The material part of Count I of the indictment in the instant case reads as follows:

> "During the period from on or about November 1, 1953, to on or about January 23, 1954, in the City of Minneapolis, County of Hennepin, State and District of Minnesota, Theodore Wisniewski did, within the meaning of the terms used in the Code of Federal Regulations, Title 26, Part 175, as published in the Cumulative Pocket Supplement thereof, wilfully, wrongfully, and unlawfully reuse for the packaging of distilled spirits one (1) marked liquor bottle, more or less previously containing distilled spirits and labeled 'Seagram's 7 Crown Blended Whiskey,' by increasing the original contents of said marked liquor bottle by the addition of a substance, to-wit, liquid distilled spirits subject to taxation under the Internal Revenue Laws of the United States, and such reuse was not within any of the methods authorized by Regulation 13, Sec. 175.62 (26 C. F. R., Sec. 175.62, 1952 Cumulative Pocket Supp.)."

Count II is identical with Count I of the indictment except that the bottle reused under Count II is alleged to have previously contained and been labeled "Lord Cal-

vert's Blended Whiskey." The defendants in the various cases again filed motions to dismiss the new indictments on the ground that they failed to state a public offense. These motions were presented to the late Judge Joyce who sustained them on the ground that the substance added consisted of distilled liquor on which the tax had been paid and, hence no revenue could or would be lost.

On appeal by the government we reversed the orders sustaining the motions to dismiss in all cases except United States v. Parzyck, 8 Cir., 225 F. 2d 180, in which it was charged that the substance added consisted of water and we affirmed the dismissal in that case. We reversed because the indictments affirmatively charged that the substance added was subject to taxation and, hence, stated a public offense and we remanded the cases for retrial. On retrial there was evidence which the government claimed sufficient to prove beyond a reasonable doubt that the defendant wilfully, wrongfully and unlawfully added a substance, to-wit, liquid distilled spirits subject to taxation, to the original contents of marked liquor bottles. It appeared without dispute that the added substance used in refilling the marked liquor bottles consisted of distilled liquor on which the tax had been paid.

At the close of all the evidence the defendant moved for judgment of acquittal, which motion the court denied and submitted the case to the jury on instructions to which certain exceptions were saved by the defendant. The jury returned a verdict of guilty and the defendant thereupon moved for judgment of acquittal notwithstanding the verdict and this motion was likewise denied by the court and judgment and sentence of guilty were entered pursuant to the verdict.

[1, 2] In seeking reversal defendant contends that the evidence was insufficient to prove beyond a reasonable doubt that the defendant authorized or was responsible

for adding the brand of distilled liquor to the other liquor contained in the marked liquor bottles. In view of the verdict of guilty we must view the evidence in a light most favorable to the government, giving the government the benefit of all such favorable inferences as might reasonably be drawn from the facts proven. So considered the evidence was, we think, sufficient to warrant the jury in finding the defendant responsible for adding the brand of distilled liquor to the other liquor contained in the marked liquor bottles and, because of our conclusion as to other issues, we shall not here consider in detail the evidence on this issue.

In further support of his contention that the court should have granted his motion for judgment of acquittal interposed at the close of all the evidence defendant urges that there was no fraud on the revenue because the liquor added was taxpaid and that the court was in error in instructing the jury that it was no defense that the government was not deprived of any revenue and that the court erred in failing to give defendant's requested instruction No. 5 to the effect that in order to find the defendant guilty the jury must find that defendant wilfully refilled the liquor bottle in question by adding other liquor liable to taxation upon which a tax was due.

The regulation of the Secretary of the Treasury which defendant is charged with violating reads as follows:

> "Reuse of containers. No liquor bottle or other authorized container shall be reused for the packaging of distilled spirits except as provided in Sec. 175.62, nor shall the original contents, or any portion of such original contents, remaining in a liquor bottle or other authorized container be increased by the addition of any substance."

The statute authorizing the Secretary of the Treasury to promulgate regulations relative to traffic in containers of distilled spirits reads as follows:

"Whenever in his judgment such action is necessary to protect the revenue, the Secretary is authorized, by the regulations prescribed by him • • • (1) to regulate the size, branding, marketing, sale, resale, possession, use, and re-use of containers • • • designed or intended for use for the sale at retail of distilled spirits • • •. Whoever willfully violates the provisions of any regulation prescribed, or the terms or conditions of any permit issued, pursuant to the authorization contained in this section, and any officer, director, or agent of any corporation who knowingly participates in such violation, shall, upon conviction, be fined not more than $1,000, or be imprisoned for not more than two years, or both • • •." 26 U. S. C., § 2871.

[3] If the regulation is authorized by this statute then it has the force and effect of a criminal statute. As it is penal and criminal in character it must be strictly construed in favor of the accused. United States v. Resnick, 299 U. S. 207, 57 S. Ct. 126, 81 L. Ed. 127; Federal Communications Commission v. National Broadcasting Co., 347 U. S. 284, 74 S. Ct. 593, 98 L. Ed. 699; France v. United States, 164 U. S. 676, 17 S. Ct. 219, 41 L. Ed. 595; United States v. Halseth, 342 U. S. 277, 72 S. Ct. 275, 96 L. Ed. 308; Schooler v. United States, 8 Cir., 231 F. 2d 560; Gesell v. United States, 8 Cir., 1 F. 2d 283; Martyn v. United States, 8 Cir., 176 F. 2d 609. In United States v. Resnick, supra, Justice Butler, speaking for the Supreme Court after announcing the doctrine that a criminal statute must be strictly construed in favor of the accused, among other things, said:

"Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses." [299 U. S. 207, 57 S. Ct. 127.]

In France v. United States, supra, defendant had been convicted on a charge of conspiring to violate a statute

prohibiting the carrying of any paper, certificate, or instrument purporting to be or representing a ticket, chance, share or interest in or dependent upon the event of a lottery across state lines. The evidence showed that defendant had in his possession the official print of the lucky number drawn, slips corresponding with the lucky number and money to be given to the winners. In reversing the conviction the Supreme Court said, inter alia [164 U. S. 676, 17 S. Ct. 221]:

> "The lottery had already been drawn; the papers carried by the messengers were not then dependent upon the event of any lottery. • • •
>
> "There is no contradiction in the testimony, and the government admits and assumes that the drawing in regard to which these papers contained any information had already taken place in Kentucky, and it was the result of that drawing only that was on its way in the hands of messengers to the agents of the lottery in Cincinnati.
>
> "The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly."

In United States v. Halseth, supra, the defendant was charged with mailing a circular letter concerning a lottery. In holding that the indictment did not state a public offense the court among other things said:

> "In the instant case, too, the statute is penal and must be strictly construed. We hold that the words 'concerning any lottery' mean an existing, going lottery or gambling scheme. The mailing does not purport to concern any existing lottery, and neither

the addressee nor the appellee was engaged in the operation of a lottery or similar scheme." [342 U. S. 277, 72 S. Ct. 277.]

In Schooler v. United States, supra, this court, in referring to the applicable rule for the construction of a criminal statute, said:

> "As stated by the Court in Farmer v. United States, 10 Cir., 1942, 128 F. 2d 970, 972:
>
> "'A criminal statute must be strictly construed [citing, *inter alia*, Gesell v. United States, 8 Cir., 1924, 1 F. 2d 283, 286]. Ambiguity in criminal statutes should not be resolved so far as to embrace offenses not clearly within the law. The facts charged and proved must bring the defendant plainly and unmistakably within the statute.'" [231 F. 2d 564.]

In 82 C. J. S., Statutes, § 389, p. 924, the rule is stated as follows:

> "• • • it is a fundamental rule in the construction of statutes that penal statutes must be construed strictly, or, as it is otherwise stated, strictly construed against the state, or strictly construed in favor of the persons sought to be subjected to their operations, or construed strictly against the prosecution and in favor of the person accused."

With this applicable rule of construction in mind we turn to a consideration of the regulation purporting to be promulgated pursuant to the statute. The statute authorizes the promulgation of regulations necessary "to protect the revenue." The regulation prohibits increasing by the addition of any substance the original contents remaining in a liquor bottle or any other authorized container. As the tax had been paid on the liquor here involved it was not possible that any further revenue could be collected and the government was not and could not

be defrauded of any revenue by this transaction. In United States v. A. Graf Distilling Co., 208 U. S. 198, 28 S. Ct. 264, 266, 52 L. Ed. 452, defendant was convicted under a somewhat similar statute. The substance added was caramel or brown sugar. In holding that this was not violative of the statute there involved the court among other things, said:

> "The matter which was added to the contents of the barrel, after it was stamped and branded, did not increase or decrease the amount of the tax otherwise payable on the spirits so colored.
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> "When, therefore, in the course of the many provisions for collecting the tax and for preventing any evasion of its due payment the statute prohibits the putting of anything else in the barrel or package, etc., after it has been branded or stamped, it seems to us the natural meaning of the language limits the addition to anything of a taxable nature, and does not include an article which is not taxable, is wholly harmless, and added for a purpose not illegal or in itself improper.
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> "We do not think that the opportunities for perpetrating a fraud upon the revenue are in any way extended by reason of the addition in question. A liquor dealer having a properly stamped barrel in his possession might violate the law and empty the contents of the barrel without destroying the stamps, and might then dispose of the barrel, so stamped, to an illicit distiller, who might then endeavor to perpetrate a fraud upon the revenue by filling the barrel with **nontax-paid** spirits, but we do not see that the prior addition, as mentioned, of coloring matter to the contents of the barrel, would aid him in his at-

tempt, nor would the absence of such matter tend in any degree to its prevention or detection.

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"It is therefore urged that as the section provides for a forfeiture of the article and a fine upon the person guilty of the addition, even when no intent to defraud is alleged or proved, it emasculates the section to hold that the addition must be something which is itself taxable. We do not think so." (Emphasis supplied.)

When the case was before Judge Nordbye on motions to dismiss the indictments he gave some consideration to the construction of the regulation here involved and in doing so reviewed to some extent the Graf decision. United States v. Goldberg, D. C., 123 F. Supp. 385, 388. In the course of his opinion it is among other things, said:

"The indictments in question contain nothing to indicate what 'substance' was allegedly added to the liquor bottles mentioned. Therefore, they can be upheld only if defendants could be convicted of a crime regardless of the nature or the quantity of the substance added.

"There are no reported decisions dealing directly with the interpretation of this regulation or its validity. However, United States v. A. Graf Distilling Co., 1908, 208 U. S. 198, 28 S. Ct. 264, 52 L. Ed. 452, is helpful on the inquiry into the meaning of the regulation. That case involved a statute which provided a penalty for selling containers marked so as to indicate that the tax thereon had been paid if the container were empty or contained 'anything else' than the original contents. On certification from the Eighth Circuit Court of Appeals, 166 F. 1021, the Government contended that it was immaterial whether the matter added was itself taxable. However, the

Supreme Court held that the addition of caramel to a container of the statutory description was not within the statute's prohibitions **because the addition of such a substance could not in any way extend the opportunities for a fraud upon the revenue.** If not in itself dispositive of the issues raised herein, the above case is persuasive authority for holding that the regulation in question cannot be sustained as broadly interpreted by the Government. This Court does not believe that the Secretary intended that the addition of any type of soluble substance to the contents of a marked liquor bottle should be subject to prosecution as a crime against the revenue.

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"The Government has not pointed out and this Court cannot perceive any rational connection between the protection of the revenue and a prohibition against adding to the contents of marked liquor bottles any type of a substance which could include even minute quantities of lemon juice, flavoring extracts, or sugar, for example, which additions might increase the contents imperceptibly but could not possibly extend the opportunities for perpetrating a fraud on the revenue." (Emphasis supplied.)

As hereinbefore recited, when new indictments were returned the defendants again interposed motions to dismiss and these motions were heard by the late Judge Joyce. On the argument before Judge Joyce the government admitted that the distilled liquor added was taxpaid and Judge Joyce apparently considered that admission as amending the indictments. On appeal we held that the indictments could not be so amended. In the course of Judge Joyce's opinion it is said:

"Although not specified in the present indictments the government concedes that the matter ad led to the

marked containers was spirits from another bottle on the contents of which the tax was paid.

"It was impossible for this Court to perceive that the addition of such tax paid spirits could possibly deprive the Government of revenue, any more than the addition of water, as in No. 8608, could have any such effect. United States v. Bardenheier, supra [D. C., 49 F. 846].

"In the language of United States v. A. Graf Distilling Co., 208 U. S. 198, 206, 28 S. Ct. 264, 52 L. Ed. 452:

" 'We do not think that the opportunities for perpetrating a fraud upon the revenue are in any way extended by reason of the addition in question. • • • We cannot see, therefore, that any reasonable purpose could be attributed to Congress in prohibiting an addition, such as is charged in this case, and we cannot construe the section on the mistaken theory that though the act was really innocent, yet it might aid in the evasion of payment of some portion of a tax, and hence must be regarded as prohibited.'

"It is immaterial whether the regulation be interpreted restrictively to exclude non-taxable or tax paid substances or merely considered to be outside the scope of the authority delegated by Section 28" in so far as the regulation should be interpreted otherwise. In any event the indictments are ineffective to state offenses under the statute and regulation and accordingly the same should be and are hereby dismissed."

[4] There was a period in our history during which the Federal Government, pursuant to Constitutional authority, attempted to regulate the liquor traffic but since the repeal of the Eighteenth Amendment to the Constitution

government regulations must be limited to those necessary to protect the revenue. Thus in United States v. Goldberg, 8 Cir., 225 F. 2d 180, 186, we said:

> "Defendants contend that the Secretary under the statute is authorized to issue regulations only for the purpose of protecting the revenue. We agree with this contention. The fact that the public may be defrauded by the device used here of pouring cheap whiskey into bottles bearing the label of a more expensive brand would not justify the regulation since under the enabling statute the Secretary may prescribe regulations only to protect the revenue."

And again, we said:

> "It seems to us that the regulation prohibiting the adding of 'any substance', which we have heretofore interpreted to mean a substance upon which a tax is due, is an entirely reasonable and necessary enforcement regulation, and as such is designed to and does protect the revenue."

As said by the late Justice Butler speaking for the Supreme Court in United States v. Resnick, supra [164 U. S. 676, 57 S. Ct. 127]:

> "Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses."

Here it appears that at least District Judges Nordbye and Joyce in effect held that to constitute an offense the substance added must be one on which a tax is due. The defendant here had two brands of distilled liquor on each of which the tax had been fully paid. Was he not warranted in construing this regulation to mean that no fraud on the revenue could possibly result by mixing these two brands of liquor on both of which the tax had been paid?

Certainly, strictly construed in favor of the accused, the regulation might well be so construed, particularly by a layman.

[5, 7] If the regulation be construed as applying to any and all substances, including distilled liquors on which the tax has been paid, then it would seem clear that it was beyond the authority of the Secretary of the Treasury to promulgate such a regulation because the regulation would have no relation to the protection of the revenue, but if construed to apply only to substances, including distilled liquors on which a tax is due, then it should be sustained. It is a familiar canon of statutory construction that where a statute is fairly susceptible of two constructions, one of which will give effect to the statute, while the other will defeat it, it is the duty of the court to adopt the one which will save and not destroy. Anniston Mfg. Co. v. Davis, 301 U. S. 337, 57 S. Ct. 816, 81 L. Ed. 1143.

We conclude that the court should have granted defendant's motion for a judgment of acquittal interposed at the close of all the evidence. As this conclusion necessitates a reversal of the judgment appealed from, we pretermit, as serving no useful purpose, any consideration of other contentions urged by the defendant. The judgment appealed from is therefore reversed and the cause remanded with directions to enter judgment of acquittal on both counts of the indictment.